



275672

FILED

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION

OCT 05 2001

KENNETH J. MURPHY, Clerk  
CINCINNATI, OHIO

THE DOW CHEMICAL CO., et al,

Plaintiff

v

CIVIL ACTION C-1-97-307  
(consol. with C-1-97-308)

ACME WRECKING CO., INC., et al,

Defendant

**ANSWER AND CROSS-CLAIM OF DEFENDANTS CLARKE'S INCINERATORS, INC.  
AND CLARKE CONTAINER CORP. TO CROSS-CLAIM OF DEFENDANT  
AERONCA, INC.**

Defendants Clarke's Incinerators, Inc and Clarke Container Corp. (collectively "Clarke"), through Counsel, answers the Cross Claim of Defendant Aeronca, Inc. and makes the following Cross Claim against Defendants Aeronca, John J. Whitton Trucking, Inc., Clarke's Services, Inc., Clarke Inc., and Richard M Clarke as follows:

1. Clarke denies the allegations set forth in paragraph 15 of Aeronca's Answer and Cross-Claim.
2. Clarke denies the allegations set forth in paragraph 16 of Aeronca's Answer and Cross-Claim.

**AFFIRMATIVE DEFENSES**

**FIRST AFFIRMATIVE DEFENSE**

Aeronca's cross-claim fails to state a claim upon which relief can be granted.

**SECOND AFFIRMATIVE DEFENSE**

Aeronca's cross-claim is barred, in whole or in part, by applicable statutes of limitations and/or the equitable doctrines of unclean hands, estoppel, laches, waiver, and/or release.

**THIRD AFFIRMATIVE DEFENSE**

Aeronca's cross-claim is subject to set-off in whole or in part by virtue of Aeronca's status as a potentially responsible party with respect to the Site.

#### **FOURTH AFFIRMATIVE DEFENSE**

Aeronca's cross-claim is barred, in whole or in part, by the doctrine of unjust enrichment.

#### **FIFTH AFFIRMATIVE DEFENSE**

Clarke denies that it is responsible for any removal or remediation costs arising out of the site. However, in the event Clarke or its alleged predecessors in interest are held liable, then and in that event, its liability should be proportionate to Clarke's contribution to the alleged release or threatened release of hazardous substances.

#### **SIXTH AFFIRMATIVE DEFENSE**

Clarke has no liability because the alleged contamination and response costs resulted from the acts and/or omissions of third parties.

#### **SEVENTH AFFIRMATIVE DEFENSE**

Clarke has no liability because the alleged contamination and response costs resulted from the acts and/or omissions of third parties.

#### **EIGHTH AFFIRMATIVE DEFENSE**

Aeronca's or other parties' actions in contaminating the Site are an intervening or superceding causes of most, if not all, of the response costs associated with the Site.

#### **NINTH AFFIRMATIVE DEFENSE**

The damages and response costs in this case are distinct and divisible; therefore, joint and several liability may not be imposed upon Clarke in interest.

#### **TENTH AFFIRMATIVE DEFENSE**

Clarke reserves the right to plead additional affirmative defenses as may be available to it as Clarke becomes aware of such Defenses during the discovery phase of this litigation.

**CROSS-CLAIM AGAINST DEFENDANTS AERONCA, INC., JOHN J. WHITTON TRUCKING, INC. CLARKE'S SERVICES, INC., CLARKE, INC. AND RICHARD M. CLARKE FOR CONTRIBUTION UNDER 42 U.S.C. 9613(f)(1)**

1. The United States has alleged that Clarke, is, along with Aeronca, Inc. John J. Whitton Trucking, Inc., Clarke's Services, Inc., Clarke, Inc., and Richard M. Clarke, jointly and severally liable to the United States under 42 U.S.C. Section 9607 for response costs incurred by the United States at the Skinner Landfill Site.


2. In the event that the Court finds that Clarke and one or more of the Cross-claim Defendants are jointly and severally liable to the United States in this action, Clarke requests the Court, under 42 U.S.C. Section 9613(f)(1), to allocate an equitable portion of the United States' response costs among the liable defendants and to enter judgment in favor of Clarke and against such Cross-claim Defendants requiring such Cross-claim Defendants to contribute to Clarke any sum that Clarke is obligated to pay to the United States that exceeds Clarke's allocated share of such costs.

WHEREFORE, Defendant Clarke requests that, in the event that judgment is entered in favor of the United States against Clarke and other Defendants in this action imposing joint and several liability for costs incurred by the United States, the Court allocated the costs among the liable Defendants, and render judgment on Clarke's Cross-claim in favor of Clarke and against the Cross-claim Defendants as requested in Paragraph 2, above.

WHEREFORE, Clark respectfully demands judgment against Cross-claim Defendant as follows:

1. an order requiring Aeronca and other Cross Claim Defendants to reimburse Clarke for all or part of the costs Clarke has incurred or may incur in connection with this action;
2. an order requiring Aeronca and other Cross Claim Defendants to pay Clarke any of its expenses, costs, and attorneys' fees in addition to recoverable cleanup costs;
3. an order granting Clarke such other relief as this Court may deem just and equitable.

Respectfully submitted,

  
\_\_\_\_\_  
Michael L. Cioffi, Esq.  
Johnathan A. Conte, Esq.  
Blank Rome Comisky & McCauley LLP  
1700 PNC Center  
201 East Fifth Street  
Cincinnati, Ohio 45202  
Phone (513) 362-8700  
Fax (513) 362-8787

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing Answer, Affirmative Defenses, Counterclaim, and Cross Claims of Clarke was served upon the following on this 5<sup>th</sup> day of October, 2001, by regular mail:

David E. Northrop, Esq.  
Porter, Wright, Morris & Arthur  
41 South High Street  
Columbus, Ohio 43215-6194

John H. Phillips, Esq.  
Phillips Law Firm, Inc.  
9521 Montgomery Road  
Cincinnati, Ohio 45242

John C. Cruden, Esq.  
Acting Assistant Attorney General  
Environment & Natural Resources Div.  
U.S. Department of Justice  
P.O. Box 7611 Ben Franklin Station  
Washington, DC 20044

W. Benjamin Fisherow, Esq.  
Deputy Section Chief  
Environment Enforcement Section  
Environment & Natural Resources Div.  
U.S. Department of Justice  
P.O. Box 7611 Ben Franklin Station  
Washington, DC 20044

Annette M. Lang, Esq.  
Environment Enforcement Section  
Environment & Natural Resources Div.  
U.S. Department of Justice  
P.O. Box 7611 Ben Franklin Station  
Washington, DC 20044

Gerald F. Kaminski, Esq.  
220 U.S.P.O. & Courthouse  
100 East 5<sup>th</sup> Street  
Cincinnati, Ohio 45202

Craig Melodia, Esq.  
77 West Jackson Boulevard  
Chicago, Illinois 60604

  
Jonathan A. Conte